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University of Utah v. Industrial Commission of Utah and Paula McQuown : Reply Brief

Utah Supreme Court

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SUPREME COURT FOR THE STATE OF UTAH

UNIVERSITY OF UTAH, Petitioner and Respondent, v. INDUSTRIAL COMMISSION OF UTAH and PAULA McQUOWN, Respondents and Appellant.	)	Case No. 20692

REPLY BRIEF

Appeal from a judgment entered by the
Honorable Scott Daniels in the
Third Judicial District Court of Salt Lake County,
State of Utah.

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ARGUMENT

I.

SINCE THE DISTRICT COURT WAS NOT THE "FACT-FINDER", IT WAS OBLIGATED TO GIVE DEFERENCE TO THE FINDINGS AND CONCLUSIONS OF THE INDUSTRIAL COMMISSION.

The disparity between KUED's recitation of the facts of this case, as compared to McQuown's statement, shows that the evidence is subject to different interpretations. Voluminous amounts of conflicting testimony and documents were received in evidence by the Administrative Law Judge during the six day trial before the Industrial Commission. This diversity of opinion respecting the

same evidence bolsters McQuown's contention in this appeal, namely, that the district court should have given deference to the findings of the Industrial Commission since it was the original fact-finder, and there were two permissable views of the evidence. Anderson v. City of Bessemer City, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

A. The district court was not the fact-finder.

Respondent mistakenly assumes that the term "fact-finder", as used in the cases, is synonymous with "district court". KUED cites Beehive Medical Electronics, 583 P.2d 53 (Utah 1973) for the proposition that the "district court findings would never be reversed unless they clearly preponderated against the evidence," and attempts to infer from this statement that findings of the Industrial Commission are not due any weight. (Respondent's Brief p. 20). In Beehive, however, the district court made its own extensive findings of fact after it had conducted a two-month trial. Because the district court acted as the trier of fact, the amount of deference which might be given to the previous findings of the Industrial Commission was not even at issue before the Supreme Court. Respondent confuses the role of the district court sitting as a trier of fact with its role as a "reviewing" court considering findings already made by a primary fact finder. Beehive contained "no reference to the Industrial Commission findings or any weight to which they were entitled," (Respondent's Brief p. 20), because the district court was the original fact-finder. Thus, the case does not support KUED's position in this appeal.

B. The role of the district court is limited when reviewing a decision of an administrative agency.

Respondent cites Salt Lake City v. Confer., 674 P.2d 634 (Utah 1983), because it "refers to the role of the district court and the weight of its findings." (Respondent's Brief p. 20). Confer does refer to the role of the district court; it limited the district court's scope of review in situations where the issue pertains to matters which fall particularly within the expertise of an administrative agency. In such cases Confer says that it is the agency's prerogative to resolve these issues. Contrary to KUED's assertion that the case was remanded to the district court, it was actually remanded to the agency because this Court determined that the agency was best suited to resolve the questions.

Confer established "reasonableness" as the standard to apply when reviewing administrative decisions. Confer at p. 636. It is noteworthy that Confer cites Utah Dept. of Adm. Services v. Public Service Comm'n, 658 P.2d 601, 609-12 (1983), for this standard. Respondent, on the other hand, argues that the reasonableness standard of review is inapplicable to the instant case because Utah Dept. of Adm. Services involves "statutes, circumstances, and issues completely different and unrelated to the Utah Anti-Discrimination Act." (Respondent's Brief p. 22). Confer, however, involved the Utah Anti-Discrimination Act. Furthermore, this Court not only applied this rule in Confer, it also applied the standard in Kehl v. Industrial Commission, _____ P.2d _____ (No. 20193, Utah, May 23, 1985), a case, like the instant case, which did not involve the Public Service Commission. In affirming a decision of the Industrial Commission, this Court said in Kehl:

"this Court adheres to the following standard of review, enunciated in Utah Department of Administrative Services v. Public Service Commission, Utah, 658 P.2d 601 (1983):

> An agency's interpretation of key provisions of the statute it is empowered to administer is often inseparable from its application of the rules of law to the basic facts . . . In reviewing decisions such as these, a court should afford great deference to the technical expertise or more extensive experience of the responsible agency . . .
>
> The degree of deference extended to the decisions of the [Public Service] Commission . . . has been given various expression, but all are variations of the idea that the Commission's decisions must fall within the limits of reasonableness or rationality.

Id. at 610. Thus, unless the administrative law judge's decision . . . is outside the limits of reasonableness or rationality, we will uphold it. (Kehl at p. 4-5, emphasis added)

Accordingly, the district court below should have upheld the findings of the Industrial Commission unless they were outside the bounds of reasonableness.

C. Deference must be given to the findings of the original fact-finder.

Although Respondent did not address the Confer holding in its brief, even the footnote cited by KUED supports McQuown's contention that it is the fact-finder's findings which are due deference.

> . . . As the fact finder in this equitable matter, the district court had the option of affirming the commission's findings, as was done in Beehive Medical Electronics v. Industrial Commission, Utah 583 P.2d 53, 55, 57 (1978), or of making its own findings.

674 P.2d at 634, note 1 (emphasis added).

This footnote describes the power of the district court when it serves as fact-finder. In the instant case, the Administrative Law Judge heard six days of testimony from fourteen witnesses and examined nearly 150 exhibits. The district court had the option of conducting a complete new trial as was done in Beehive. It chose not to do so. See Order Respecting Motion for Trial on the Record and Other Relief. Based on the completeness of the record below, and the procedural fairness with which it was made, the district court decided to conduct a "review" of the record. The district court had the discretion under the Utah Anti-Discrimination Act to conduct such a "trial de novo on the record," but in doing so it does not act as the original fact-finder within the meaning of cases like Anderson v. City of Bessemer City. In these situations, the district court is duty-bound to follow the precedent of Kehl, Confer and Utah Dept. of Adm. Services when conducting its review; it cannot disturb the findings of the Industrial Commission unless they were beyond the bounds of reasonableness.

Respondent concedes that in Utah the clearly erroneous standard is applicable to appeals from the decision of an original fact-finder even though the Utah Rules of Civil Procedure do not contain the same language as Rule 52 of the Federal Rules of Civil Procedure. Anderson v. City of Bessemer City, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), cited by KUED on this point, actually supports McQuown's contention. Anderson interprets Rule 52 to require that deference be given to the decisions of the original finder of fact, and to require even greater deference when findings are based on determinations of the witnesses' credibility. This deference is mandatory because:

> . . . only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said . . . But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. [Citations omitted] Anderson, 105 S.Ct. at 1513.

The district court only heard McQuown, Esplin and Gregoire recite their educational background and a summary of their employment histories. It heard no testimony regarding any of the circumstances and events which led to McQuown's termination from KUED. The fact that the district court entered its own written findings must not be given undue weight nor considered out of context. Judge Daniels issued his findings only because the Act seemed to require them. In reality, Judge Wells presided over the "trial" during which over 1,000 pages of testimony were reported. Judge Wells was the fact-finder. He decided which witnesses were most believable and which conflicting testimony was most plausible. Anderson demands that the reviewing court — the district court — give deference to Judge Wells' findings. Under Anderson, these findings could "virtually never be clear error." Id.

II.

McQUOWN'S OBJECTIONS ARE TIMELY AND HAVE NOT BEEN WAIVED.

McQuown's objections to the district court's errors are indeed timely. Respondent argues that McQuown should have objected at the district court level to that court's failure to give deference to the Industrial Commission's findings. Such an objection, however, was impossible because the error was not apparent

until after the district court had ruled. Again, the district court was acting as a "reviewing" court, not as a "trial" court; if a reviewing court commits error, i.e. applies the law incorrectly, the remedy is to appeal as has been done in this case.

Prior to conducting its review, McQuown asked the district court to limit its "trial de novo" to a "review of the record" and the district court agreed. See Order Respecting Motion for Trial on the Record and Other Relief. Respondent argued for a completely new trial but the court granted McQuown's motion over Respondent's objection.[1] In seeking a "review" on the record, McQuown's objective was to avoid the time, expense and staleness of a retrial, and to convince the district court that, under the circumstances, the Act authorized such a "review". McQuown never advocated that the district court abandon all applicable "standards of review", as KUED now seems to argue. McQuown only advocated that the district court "review" the administrative record with the deference appropriate for a "reviewing court." If the district court had applied

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[1] Respondent's Memorandum filed August 29, 1984, argues strenuously that it would be unfair if the district court rendered a decision without observing the witnesses:

> However, petitioner submits that a limited amount of direct testimonial evidence is essential in this areas [sic] of the law relative to issues of sex discrimination, because it involves a determination of personal intent and even subconscious feelings and personalities of the parties by the finder of fact. Such factual issues are impossible to fairly determine without the presence of the key parties. It would clearly be unfair to the petitioner not to permit it to present for the court's observation the most significant witnesses, including intervenor.

Respondent's Motion clearly acknowledges that deference must be given to the fact-finder who evaluates the demeanor and credibility of the witnesses. It is puzzling that Respondent now argues against the position it took so ardently before the district court.

the proper standard of review, it would have upheld the findings of the Industrial Commission.

III.

INTENT TO DISCRIMINATE NEED NOT BE PROVED TO ESTABLISH A CLAIM OF AGE DISCRIMINATION.

Respondent's contention that a successful plaintiff in an age discrimination suit must establish an intent to discriminate is plainly wrong. The plaintiff bears only the burden of proving by a preponderance of the evidence that the defendant engaged in discriminatory practices. It is not necessary to prove that a present intent to discriminate existed at the time of the discriminatory practices. 14 C.J.S. Supp. Civil Rights § 192 (1974), see also: McDonnell Douglas, supra, Burdine, supra, Furnco Construction v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978); Muller v. United States Steel Corporation, 509 F.2d 923 (10th Cir. 1975).

A Third Circuit opinion, Duffy v. Wheeling Pittsburg Steel Corp., 738 F.2d 1393 (3rd Cir. 1984) makes clear the plaintiff's and defendant's burdens in such a suit. The question presented on appeal in Duffy was "whether the district court applied proper legal precepts in holding that a pretextual justification is equivalent to a finding of intentional discrimination under the ADEA." Id. at 1394. The court held that by showing that defendant's proffered justification for the employment action was merely a pretext plaintiff carried the burden of proof. "[U]nder the McDonnell Douglas test, a showing that a proffered justification is pretextual is itself equivalent to a finding that the employer

intentionally discriminated." Id. at 1396, citing Burdine. In Burdine, the Supreme Court of the United States said:

> This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804-805, 93 S.Ct., at 1825-1826. Burdine at 257 (emphasis added).

Plaintiff need not prove that age was the employer's sole or exclusive consideration, only that "age made a difference in the decision." Duffy at 1395.

Aikens v. United States Postal Service, 642 F.2d 514 (D.C. Cir. 1980), also establishes that intent is not an element which must be proved in a discrimination case. KUED argues that Aikens should not apply here because the district court summarily dismissed the case finding "that plaintiff had failed to sustain the initial burden of establishing a prima facie case." (Respondent's brief at p. 31). If Respondent had read further, it would have discovered that the court held that plaintiff indeed had made out a prima facie case of discrimination because he should not have been required to prove that the discrimination was intentionally motivated. In reversing the district court's summary dismissal, the Circuit Court said:

> The second legal defect is found . . . wherein the District Court ruled that it was "critical" for plaintiff to offer "proof of discriminatory motive on the part of defendant." . . . a suit alleging individual discrimination does not require a showing of discriminatory motive. [Citations omitted]

KUED concedes that Judge Daniels rested his findings on a determination that McQuown had failed to prove an intent to discriminate (Respondent's Brief at p. 31-32). This burden of proof is squarely against established authority. The district court must be reversed.

CONCLUSION

Because the district court was not the original fact-finder it was required to give deference to the Industrial Commission's findings. Those findings are due great deference because they were based upon Judge Wells' evaluation of conflicting testimonies where "variations in demeanor and tone of voice . . . bear so heavily on the listener's understanding of and belief in what is said . . . ." Anderson, 105 S.Ct. at 1513.

If the district court had applied the correct standard of review, it could not have reversed the findings of the Industrial Commission unless the court also found that such findings were beyond the bounds of reasonableness. Judge Daniels conceded that he merely disagreed with the previous findings even though they were credible. Disagreement is far from a finding of unreasonableness. The findings and order of the Industrial Commission must be upheld.

It is firmly established that a successful plaintiff in an age discrimination suit need not prove an intent to discriminate. Inasmuch as Respondent has acknowledged that the district court's findings were based upon the determination that McQuown was required to prove intentional discrimination, the district court must be reversed.

This Court should direct the entry of judgment affirming the findings and order of the Industrial Commission.

Respectfully submitted this 27th day of November, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 1985, a true and correct copy of the foregoing Reply Brief was mailed, postage prepaid, United States Mail, first class to William T. Evans, Esq., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114.